

Appeals

October 2016



The United Church of Canada
L'Église Unie du Canada

Appeals (October 2016)



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L'Église Unie du Canada



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About This Resource

This resource contains

- policies and procedures that must be followed.
- best practices that provide information, guidance, and advice on the best ways to live out mandatory policies and procedures, which you are encouraged but not required to follow. Following these best practices will help ensure compliance with secular law requirements that apply to appeals.

This edition of the Appeals resource reflects changes to *The Manual, 2016*, section J.13.7 regarding the communication date for starting the appeal.

Please refer to the current edition of *The Manual*.

Living Out God's Mission in the World

The policies and procedures of The United Church of Canada exist to support the church in living out God's mission in the world. The appeal procedures aim to support the adjudication of disputes within the church with compassion and justice.

Policies and Procedures

This section contains policies and procedures that are mandatory and must be followed.

The Manual contains the basic policies and procedures for formal hearings. The Rules of Procedure for Appeals set out below contain all of the policies and procedures that apply to appeals, including the basic policies and procedures from *The Manual* and additional rules of procedure inserted where appropriate.

Section J.14 of *The Manual* has also been included here for quick reference, as it contains the policy and procedures for giving notices and other documents in the appeal process.

Rules of Procedure for Appeals

J.13. Appeals

13.1 Rules of Procedure

There are rules of procedure that must be followed in all appeals.

13.2 What May Be Appealed

In general, the following may be appealed:

- (a) decisions by a court or commission; and
- (b) rulings of the General Secretary of the General Council.

There are some exceptions, set out below.

13.3 Exceptions: Decisions That May Not Be Appealed

The following decisions may not be appealed:

- (a) a decision by a court or commission making policy in any area for which it has responsibility;
- (b) initiation of a call or settlement;
- (c) a decision to designate, not to designate, to renew the designation of, or not to renew the designation of a person as an interim minister;

- (d) initiation of an appointment;
- (e) implementation of a decision that is being appealed;
- (f) a decision by an Appeal Committee on whether to hold an appeal hearing under section J.13.9.1 below;
- (g) acceptance or rejection of a medical certificate;
- (h) a decision by a pastoral charge to request a change in the pastoral relationship;
- (i) a decision by a presbytery on whether to approve a request from a member of the order of ministry for a change in the pastoral relationship;
- (j) a decision by a court on whether to hold a formal hearing;
- (k) a decision by a Formal Hearing Committee on whether to hold a formal hearing;
- (l) a decision by a court to make a formal complaint;
- (m) a decision by a presbytery to initiate a review under section J.9.3 [of *The Manual*];
- (n) elections; and
- (o) in general terms, all decisions that are interim steps rather than final steps in a process.

13.4 Who May Appeal

An appeal may be made by a person or court directly affected by the decision or ruling. The Appeal Committee will decide who is directly affected. In an appeal to the Judicial Committee of the General Council, its executive is responsible for making this decision.

A decision of a Formal Hearing Committee may only be appealed by a party to the formal hearing. In a formal hearing held to deal with a formal complaint, the parties to the formal hearing are the complainant and the respondent.

A decision of the presbytery about congregational property may be appealed by any five members of the congregation.

The person or court that is appealing is called the “appellant.”

13.5 Where an Appeal Is Made

The “appeal court” is the court to which the appeal is made.

A decision of a court is appealed to the next court that has oversight of it.

In the following cases the Judicial Committee of the General Council is the appeal court:

- (a) a decision of a Formal Hearing Committee is appealed;
- (b) a decision of the Executive of the General Council is appealed; and
- (c) a ruling of the General Secretary of the General Council is appealed.

13.6 Grounds for Appeal

An appeal must be made on one or more of the following grounds:

- (a) the court that made the decision failed to consider the matter as completely as practicable;
- (b) the decision was not in accordance with the rules of natural justice;
- (c) the decision was not reasonable based on the evidence;

- (d) the decision was not in accordance with the polity of the United Church; or
- (e) there is evidence available that could not have been produced earlier and that may be relevant.

13.7 Starting the Appeal

13.7.1 Communication Date

There are time limits in the appeal process that must be followed. The first step is to determine the “communication date.” This is the date that the appellant is considered to have formal notice of the decision.

The communication date is the earlier of

- (a) the day the appellant receives the decision as set out in section J.14.4 below; and
- (b) 15 days after the court posts the draft minutes of the meeting at which the decision was made.

If the minute of the decision is changed when the court approves the minutes, the communication date is the earlier of

- (c) the day the appellant receives the changed decision as set out in J.14.4 below; and
- (d) 15 days after the court posts the changed minutes of the decision.

13.7.2 Notice of Appeal

The appellant must send a notice indicating that they are appealing the decision or ruling. The following requirements apply:

- (a) the notice must be sent to the secretary of the appeal court;
- (b) the appellant must send the notice within 30 days of the communication date; and
- (c) the notice must be sent in one of the ways set out in J.14.4 below.

Additional Rules of Procedure

13.7.3 Notice to Other Parties

The secretary of the appeal court must send a copy of the appellant’s notice to the other parties to the appeal. The following requirements apply:

- (a) the secretary must send the copy of the notice within five days of the date that the secretary received it as set out in section J.14.4 below; and
- (b) the copy of the notice must be sent in one of the ways set out in section J.14.4 below.

13.7.4 Parties

The parties to an appeal are the following:

- (a) for an appeal of a ruling of the General Secretary, General Council: the appellant and the General Secretary, General Council;

- (b) for an appeal of a decision of a Formal Hearing Committee: the appellant, the court that held the formal hearing, and the other parties to the formal hearing; and
- (c) for an appeal of any other decision: the appellant and the court whose decision is being appealed.

13.7.5 Informing Parties of Procedures

This section applies to an appeal of a ruling of the General Secretary, General Council.

The Executive of the Judicial Committee of the General Council must send a copy of the rules of procedure to the appellant

- (a) within five days of the date that the secretary received the notice of appeal as set out in section J.14.4 below; and
- (b) in one of the ways set out in section J.14.4 below.

13.7.6 Appellant's Statement

The appellant must send a statement of the arguments in support of their appeal. The following requirements apply:

- (a) the notice must be sent to the secretary of the appeal court;
- (b) the appellant must send the statement within 30 days of the date that the secretary received the notice of appeal as set out in section J.14.4 below; and
- (c) the notice must be sent in one of the ways set out in section J.14.4 below.

The appellant must meet these requirements or the appeal will be considered to have been abandoned.

13.7.7 Statement to Other Parties

The secretary of the appeal court must send a copy of the statement from the appellant to the other parties to the appeal. The following requirements apply:

- (a) the secretary must send the copy of the statement within seven days of the date that the secretary received it as set out in section J.14.4 below; and
- (b) the copy of the statement must be sent in one of the ways set out in section J.14.4 below.

13.7.8 Reply

Any of the other parties to the appeal may send a reply to the appellant's statement. If a party decides to send a reply, the following requirements apply:

- (a) the reply must be sent to the secretary of the appeal court;
- (b) the party must send the reply within 30 days of the date that party received the statement as set out in section J.14.4 below; and
- (c) the reply must be sent in one of the ways set out in section J.14.4 below.

13.7.9 Reply to Other Parties

The secretary of the appeal court must send a copy of the reply to the appellant and the other parties to the appeal. The following requirements apply:

- (a) the secretary must send the copy of the reply within seven days of the date that the secretary received it as set out in section J.14.4 below; and
- (b) the copy of the reply must be sent in one of the ways set out in section J.14.4 below.

13.7.10 Appeal Committee for Presbytery or Conference

If the appeal court is the presbytery or Conference, it appoints three to five United Church members to serve as the Appeal Committee to deal with the appeal.

13.7.11 Appeal Committee for General Council

If the appeal court is the Judicial Committee of the General Council, the Executive of the Judicial Committee appoints

- (a) five members of the Judicial Committee to deal with an appeal of a decision by a committee of the General Council;
- (b) seven members of the Judicial Committee to deal with an appeal of a decision by the Executive or Sub-Executive of the General Council;
- (c) five or seven members of the Judicial Committee to deal with an appeal of a ruling by the General Secretary, General Council; and
- (d) in any other appeal, three members of the Judicial Committee to deal with the appeal.

13.7.12 Appeals re Sexual Abuse Policy

This section applies to appeals involving a formal complaint under the Sexual Abuse Policy. The following requirements apply:

- (a) the Appeal Committee must include both men and women;
- (b) at least half the members of the Appeal Committee must be the same gender as the complainant; and
- (c) the Appeal Committee must be familiar with the Sexual Abuse Policy before dealing with the appeal.

13.7.13 Terms of Reference

The body responsible for appointing the Appeal Committee also

- (a) names the chair and secretary of the Appeal Committee;
- (b) sets deadlines for hearing the appeal and for the Appeal Committee to report to the appeal court; and
- (c) names the resources available for the appeal.

13.8 Implementation of Decision During an Appeal Process

A decision is automatically implemented even if it is being appealed.

There is one exception. The court that made the decision may decide not to implement the decision until the conclusion of the appeal process. The court may make this decision on its own initiative or at the request of the appellant.

Additional Rules of Procedure

13.8.1 When Process Applies to Appellant's Request

There is a process to be followed when the appellant requests that a decision not be implemented. The process is outlined in sections J.13.8.2 and J.13.8.3 below.

It applies if

- (a) the decision was made on a formal complaint by a Formal Hearing Committee; and
- (b) the decision was some action other than a suspension.

For any other kind of decision, the process to be followed is within the discretion of the court that made the decision.

13.8.2 Request by Appellant

The appellant may send a request for a decision not to be implemented.

The following requirements apply:

- (a) the request must be sent to the General Secretary, General Council;
- (b) the appellant must send the request within five days of the date that the appellant received notice of the decision as set out in section J.14.4 below; and
- (c) the notice must be sent in one of the ways set out in section J.14.4 below.

13.8.3 Ruling on the Request

The Moderator, the immediate past Moderator, and the General Secretary, General Council, make a decision on the request. If one of those three officers is a party to the appeal, the chair of the Judicial Committee of the General Council makes the decision instead.

13.9 Appeal Process

13.9.1 Deciding Whether to Hear the Appeal

The appeal court appoints three to five United Church members to serve as the Appeal Committee to deal with the appeal.

The Appeal Committee is responsible for deciding whether or not to hear the appeal.

If the Appeal Committee decides to hear the appeal, it holds an appeal hearing.

If the Appeal Committee decides not to hold an appeal hearing, that is the end of the appeal process. There is no further right of appeal.

Additional Rules of Procedure

The Appeal Committee considers the appellant's statement and the reply of the other parties to the appeal. Based on these documents, it must decide:

- (a) to refuse to hear the appeal because the grounds for an appeal have not been met as set out in J.13.6 above; or
- (b) to hear the appeal based on one or more of the grounds set out in J.13.6 above.

If the Appeal Committee decides not to hold an appeal hearing because the grounds for an appeal have not been met, that is the end of the appeal process. There is no further right of appeal.

If the appeal court is the General Council, the Executive of the Judicial Committee makes this decision instead of the appeal committee.

13.9.2 Appeal Hearing

The Appeal Committee holds an appeal hearing following the rules of procedure.

After the appeal hearing, the Appeal Committee may decide to

- (a) allow the appeal, with or without conditions;
- (b) dismiss the appeal, with or without conditions; or
- (c) order a formal hearing of the matter to be held by the appeal court or the court that made the original decision.

Additional Rules of Procedure

The Appeal Committee holds an appeal hearing following these rules of procedure:

- a. **Notice of Hearing.** The Appeal Committee must give each of the parties at least 15 days' notice of the appeal hearing as set out in section J.14.4 below.
- b. **Confirming Attendance at Hearing.** The Appeal Committee may ask the appellant to confirm in writing that the appellant will be present for appeal hearing. The appellant must provide the confirmation within five days of receiving the request as set out in section J.14.4 below. If not, the Appeal Committee may consider the appeal to have been abandoned.
- c. **Failure to Attend.** The appellant must be present for the appeal hearing either personally or through legal counsel or another representative. If not, the Appeal Committee may consider the appeal to have been abandoned.
- d. **Delay in Hearing.** This section applies if the appeal hearing has not taken place within one year from the date of the notice of appeal. Any party to the appeal may ask the appeal court to order that the appeal be heard immediately or to decide that the appeal has been abandoned. The requesting party must give the other parties 30 days' notice of the request before the appeal court may make this order or decision.
- e. **Counsel.** Any party to the appeal may participate at the appeal hearing personally or through legal counsel or other representative.
- f. **Open or Closed Hearing.** The appeal hearing is open unless
 - (i) the Appeal Committee decides otherwise because an open hearing would adversely affect any person; or
 - (ii) the appeal involves a formal complaint under the Sexual Abuse Policy.

When an appeal hearing is closed, the only persons who may be present are the parties, their legal counsel or other representatives, the Appeal Committee and its legal counsel, and the recorder. The Appeal Committee may also allow one or two support persons to attend for each party.

- g. **Rules of Evidence.** The appeal hearing is conducted like a hearing in a secular court of law. The Appeal Committee must follow the applicable rules of evidence for the province or territory in which the appeal is held.
- h. **Hearing Record.** The Appeal Committee must ensure that a word-for-word full and accurate record of the hearing proceedings is kept unless the parties agree to some other form of record.
- i. **Costs.** The Appeal Committee decides who is responsible for paying or contributing to the costs related to the appeal. This includes the costs for the record of the hearing proceedings travel and accommodation for the parties and witnesses, legal counsel fees, and legal counsel disbursements.

13.9.3 Decisions of Appeal Committees

This section applies to appeals if the appeal court is the presbytery or the Conference.

The decision of an Appeal Committee made under section J.13.9.2 above is the decision of the court that appointed it. That court may not debate the decision or change it in any way. It may, however, appeal the decision to the next court.

13.9.4 Decisions of Judicial Committee

- a. **Final until General Council:** All decisions of the Judicial Committee of the General Council made under section J.13.9.2 above are final and binding on all parties until the next regular meeting of the General Council.
- b. **Report to General Council:** The General Secretary of the General Council is responsible for reporting all decisions made by the Judicial Committee since the previous regular meeting of the General Council.
- c. **Review of Decision by General Council:** The General Council may review but not rehear any decision of the Judicial Committee that has been reported to it and
 - (i) affirm the decision; or
 - (ii) refer the decision to the Judicial Committee for further hearing.
- d. **Grounds for Review:** A review may be made on one or more of the following grounds:
 - (i) the Judicial Committee failed to consider the matter as completely as practicable;
 - (ii) the decision was not in accordance with the rules of natural justice;
 - (iii) the decision was not reasonable based on the evidence;
 - (iv) the decision was not in accordance with the polity of the United Church; and
 - (v) there is evidence available that could not have been produced earlier and that may be relevant.
- e. **Final Decision:** The decision of the Judicial Committee is considered to be the final decision of the General Council if
 - (i) it has been reported to the General Council and not reviewed; or
 - (ii) it has been reported to the General Council, reviewed, and affirmed.

Giving and Receiving Documents

J.14. Documents—Giving and Receiving

14.1 Application

This section (J.14) applies to the notices and other documents that are given and received as part of the formal hearing and appeal processes.

14.2 Documents in Writing

All documents must be in writing.

14.3 Address for Giving Documents

A document must be given to the person

- (a) at the address or fax number that the person has given to the court in writing; or
- (b) if no address or fax number has been given, at the address for the person as shown in the records of the court.

14.4 How to Give Documents

There are five ways to give documents. One of these ways must be used:

- (a) **Personally:** The document may be given to the person personally. It is considered received by them on the date it is given;
- (b) **Fax:** The document may be given to the person by sending it by fax if the person has given their fax number to the court in writing. The document is considered received by them on the day it is sent;
- (c) **Assured Delivery:** The document may be given to the person by sending it by assured delivery (registered mail). It is considered received by them on the 10th day after it is sent;
- (d) **Courier Delivery:** The document may be given to the person by sending it by courier. It is considered received by them when that person has signed to acknowledge receipt of the document; or
- (e) **E-mail:** The document may be given to the person by sending it by e-mail. It is considered received when the recipient confirms to the sender that the document has been received.

The sender must include the sender's name, the sender's e-mail address, the date and time of transmission, and the name and telephone number of a person to contact if there are transmission problems.

14.5 Calculating Notice Period

If the notice period for giving or receiving a document is seven days or less, the following days are not counted: Saturdays, Sundays, statutory holidays, and the time between December 25 and January 1.

Best Practices for Appeals

This section contains information, guidance, and advice on the best ways to live out mandatory policies and procedures. You are encouraged but not required to follow these best practices. Following these best practices will help ensure compliance with secular law requirements that apply to appeals.

All section references are to *The Manual*, 2013, and the parallel section in the Rules of Procedure for Appeals (above, pp. 4–12).

There are two, three, or more parties to an appeal, depending on the circumstances. This resource assumes that the appeal involves an appellant plus at least two other parties. If the appeal involves an appellant plus only one other party, this resource still applies with any necessary adjustments to the terms “party” and “parties.”

First Issues to Consider

Has a decision or ruling been made?

A decision may only be appealed if it is the final step in a particular matter.

A decision to make a recommendation or a request may not be appealed. It is an interim step in a process. The decision is made when the court votes by motion to adopt, to reject, or to take some other action on the recommendation.

Is there a right to appeal?

Certain decisions may not be appealed and they are listed in section J.13.3.

This list includes “a decision by a court or commission making policy in any area for which it has responsibility.”

When a court makes policy, it is setting out its position on a particular matter. It is acting in its legislative capacity, and the decision may not be appealed. Here are two examples of a policy decision that is not subject to appeal:

- The Conference adopts a motion in support of more affordable housing within the province.
- The Executive of the General Council sets a sabbatical leave policy for staff of the General Council.

Who may appeal?

A decision may only be appealed by a person or court directly affected by the decision or ruling. To be “directly affected” means that the decision will have some real and direct impact on the person or court—not just a theoretical or possible impact. A person or court may have strong feelings about the decision or ruling but that alone does not mean they are “directly affected”

by it. The Appeal Committee will decide who is “directly affected.” In an appeal to the Judicial Committee of the General Council, its executive is responsible for making this decision.

For a decision by a Formal Hearing Committee, only a party to the formal hearing may appeal the decision.

What is the deadline for appealing a decision?

There are time limits in section J.13.7 and the associated Rules of Procedure for Appeals for starting an appeal. An appeal is started by sending a notice of appeal to the secretary of the appeal court.

Here is an example based on a presbytery decision to dissolve a pastoral relationship.

A person (the appellant) wishes to appeal the presbytery’s decision to dissolve their pastoral relationship.

The presbytery made the decision on March 1. The presbytery pastoral relations convenor called the appellant that day to inform them of the decision. The convenor also sent a letter with a copy of the presbytery’s motion to the appellant by assured delivery on March 7.

On March 25, the presbytery secretary posted the draft minutes of the March 1 presbytery meeting on the presbytery’s website.

There were some corrections made to minutes at the April presbytery meeting, but they related to a property matter, not to the decision to dissolve the pastoral relationship. These corrections were noted in the minutes of the April meeting, which the secretary posted in draft form on the presbytery’s website on April 25.

Here is how the Rules of Procedure for Appeals apply to the example to calculate the deadline for appealing a decision.

13.7.1 Communication Date

There are time limits in the appeal process that must be followed. The first step is to determine the “communication date.” This is the date that the appellant is considered to have formal notice of the decision.

The communication date is the earlier of

(a) the day the appellant receives the decision as set out in section J.14.4 below; and

Commentary: *In the example, the date the appellant receives the decision is March 17. The presbytery sent a letter by assured delivery to the appellant on March 7. It is considered received on the 10th day after is sent. March 7 + 10 days = **March 17.***

- (b) 15 days after the court posts the draft minutes of the meeting at which the decision was made.

Commentary: *In the example, the draft minutes were posted on March 25. March 25 + 15 days = April 9.*

If the minute of the decision is changed when the court approves the minutes, the communication date is the earlier of

- (c) the day the appellant receives the changed decision as set out in J.14.4 below; and
(d) 15 days after the court posts the changed minutes of the decision.

Commentary: *This paragraph doesn't apply because, in the example, no changes were made to the decision in the minutes.*

Under section J.13.7.1, there are two possible communication dates for the example: March 17 and April 9. Since March 17 is the earlier date, it is the "communication date" under section J.13.7.1. That means the appellant has 30 days from March 17 to send their notice of appeal to the secretary of the appeal court.

The secretary of the appeal court provides a copy of the notice of appeal to the other parties. This must be completed within five days after the secretary receives the notice of appeal under section J.14.4.

For example, if the appellant sent the notice of appeal by fax on April 1, the secretary received it the same day and would have until April 6 to give a copy to the other parties.

What other documents are required for the appeal?

Statement of Arguments: The appellant provides a statement outlining the arguments to be made of the grounds of the appeal to the secretary of the appeal court. This step must be completed within 30 days after the secretary of the appeal court received the notice of appeal under section J.14.4. For example, if the appellant sent the notice of appeal by assured delivery on April 1, the secretary of the appeal court "received" it under section J.14.4 on April 11. April 11 + 30 days = May 11. The appellant has until May 11 to give their statement of arguments to the secretary of the appeal court.

The secretary of the appeal court provides a copy of the statement to the other parties within seven days after the secretary receives it under section J.14.4. For example, if the appellant sent the statement of arguments by assured delivery on May 1, the secretary "receives" it on May 11. It does not matter whether the secretary actually receives it before or after that date. The secretary would have until May 18 to give a copy to the other parties.

Reply: Any other party to the appeal may (but is not required to) provide a reply to the appellant's statement of arguments. The reply is given to the secretary of the appeal court within 30 days after that party receives a copy of the appellant's statement under section J.14.4. For example, if the secretary of the appeal court sent a copy of the statement by assured delivery on May 15, the party "received" it under section J.14.4 on May 25. May 25 + 30 days = June 24. The party has until June 24 to give a reply to the secretary of the appeal court.

The secretary of the appeal court provides a copy of the reply to the appellant within seven days after the secretary receives it under section J.14.4. For example, if the party gave their reply by hand personally on June 21, the secretary "receives" it that day. The secretary has until June 28 to give a copy to the appellant and any other parties.

How important is it to meet these time limits?

These time limits need to be met throughout the appeal process. There is no clear authority in *The Manual* for an Appeal Committee to give extensions.

An appellant may be late in serving a notice of appeal. In that case, the appeal committee could refuse to hear the appeal. If the Appeal Committee proceeds to hear the appeal anyway, the other parties to the appeal may have grounds to go to the secular courts and have the Appeal Committee's eventual decision overturned.

Calculating these dates can be confusing. To avoid any mistakes, it is a good practice for the secretary of the appeal court to remind the appellant and other parties of the applicable time limits. For example, when the secretary sends the appellant's statement to the other parties, the secretary could indicate the deadline for the other parties to send their reply to the secretary.

Prehearing Matters***Is there anyone who shouldn't serve on the Appeal Committee?***

Members of a presbytery or Conference Appeal Committee do not need to be members of the court that is hearing with the appeal. The requirements are that (i) they be members of the United Church and (ii) there are no bias concerns about that person as outlined below.

For appeals to the Judicial Committee of the General Council, there are additional requirements; see section 13.7.11 of the Rules of Procedure for Appeals.

There are also additional requirements about the gender composition of the Appeal Committee if the appeal involves a formal complaint under the Sexual Abuse Policy. See section 13.7.12 of the Rules of Procedure for Appeals.

It is usually the executive or sub-executive of the appeal court that appoints the Appeal Committee. For appeals to the Judicial Committee of the General Council, it is the Executive of the Judicial Committee that makes the appointment.

Appeal Committee members must not be biased for or against either the appellant or other parties. It is not enough for committee members to honestly believe that they can be impartial in their role. There must also be no appearance of bias or reasonable apprehension of bias.

Here is a test for determining if either of these concerns exists. It is based on the point of view that an average reasonable person would have in the situation. It assumes the person knows all the facts about the Appeal Committee member. Would that average reasonable person suspect that the committee member might be influenced, even unintentionally, to favour one side or the other in the formal hearing? A committee member might be influenced by something they read or hear at the appeal hearing. That is acceptable. But if the average reasonable person thinks the committee member might be influenced for any other reason, they should not serve on the Appeal Committee.

Here are some guidelines for deciding whether a particular Appeal Committee member is biased:

- The Appeal Committee member is disqualified if a party to the appeal is a relative or friend of the member, or has some other close association with the member.
- The Appeal Committee member is disqualified if the member has “prejudged” the case by having expressed an opinion about it about it in favour or against any party.
- If there has been a previous formal hearing or appeal hearing involving any of the parties, none of the members from the previous Formal Hearing or Appeal Committee is automatically disqualified from the appeal hearing, but it would be preferable to appoint a new committee.
- No one who took part in the original decision that is being appealed, *or in the process leading up to that decision*, should be a member of the Appeal Committee.

What should be included in the terms of reference?

The appeal court must set terms of reference for the appeal committee under 13.7.13 of the Rules of Procedure for Appeals. Here are some guidelines for setting them.

13.7.13 Terms of Reference

The body responsible for appointing the Appeal Committee also

- (a) names the chairperson and secretary of the Appeal Committee;
- (b) sets deadlines for hearing the appeal and for the Appeal Committee to report to the appeal court; and

Best Practices: *Specify a date, and also give the Appeal Committee the right to extend past that date, if it becomes necessary or desirable (for example, due to the illness of one of the parties during the course of the appeal hearing).*

*Do not simply specify an absolute deadline as limiting the Appeal Committee's discretion in this way may be considered a breach of natural justice.**

- (c) names the resources available for the appeal.

Best Practices: *Name the expenses the court will reimburse or pay for (e.g., appeal hearing room rental) and the expenses the appellant and other parties must pay for themselves (e.g., travel costs for support persons).*

Do not indicate that either party will have to pay another party's costs. This must be determined by the Appeal Committee after it makes its decision.

The terms of reference may include a financial limit for the expenses of the Appeal Committee as long as they also include a statement that the Appeal Committee may exceed limit where it becomes necessary or desirable. For example, additional funds may be needed to pay for a wheelchair-accessible appeal hearing room if one of the parties, or their legal counsel or other representative requires it.

*Do not simply specify an absolute limit on the amount that is available to the Appeal Committee for expenses. Limiting the committee's discretion in this way may be considered a breach of natural justice.**

* If there is a breach of natural justice in the course of the appeal, it may affect the validity of the appeal committee's decision. See “Natural Justice and the Duty to Act Fairly” on page 21 below for more information.

Are there grounds for an appeal?

The Appeal Committee must review the appellant's statement and any reply from the other parties and decide whether one or more of the grounds for an appeal listed in section J.13.6 are met. If one or more of the grounds are met, the Appeal Committee will make a decision to proceed to hear the appeal. If not, the Appeal Committee will make a decision to refuse to hear the appeal.

At this stage of the process, the Appeal Committee does not need to be convinced that the appellant would win the appeal. The Appeal Committee does not even need to be persuaded on the balance of probabilities (i.e., 51 percent certain). While it is always up to the Appeal Committee to decide whether or not there are grounds for an appeal, here is a suggested guideline. The Appeal Committee could decide to hear the appeal if, in the Appeal Committee's opinion,

- the appellant has raised one or more issues that are based on the grounds listed in J.13.6;
- the other parties have not completely negated those issues through the arguments contained in the reply; and
- those issues deserve further consideration in an appeal hearing.

After the Appeal Committee has made its decision, it must give notice of its decision to both parties. The notice must be given as set out in section J.14.4. If the committee's decision is to refuse to hear the appeal, the reasons for the decision must be included with the notice.

Does the decision get implemented before the appeal is heard?

The short answer is "yes," unless the court that made the decision decides otherwise. The court may make this decision on its own initiative or on the request of the appellant. There is one case in which there is a special process for the appellant to request that the decision under appeal not be implemented. It is when:

- the appeal is from a decision by a Formal Hearing Committee;
- the decision arose from a formal complaint; and
- the decision is one *other than* a decision to suspend the respondent.

If these three criteria are met, the appellant may make a request to the General Secretary of the General Council that the decision not be implemented until the conclusion of the appeal. The request must be made not later than five days after the appellant receives notice of the decision that is being appealed under section J.14.4. The process that is followed for this kind of request is set out in the Rules of Procedure for Appeals 13.8.

All other decisions are implemented regardless of whether there is an appeal commenced.

How are the parties notified about the scheduling of the formal hearing?

The Appeal Committee must give notice of the appeal hearing in writing to the appellant and other parties at least fifteen days before the appeal hearing takes place.

It is wise for the Appeal Committee to give the parties more than the minimum period of notice, so that the parties have adequate time to arrange for legal counsel (if desired) and to prepare for the appeal hearing. Before sending out the notice, the secretary of the Appeal Committee should check out possible dates with the parties. This will help to avoid, for example, a party requesting an adjournment because their lawyer is unavailable that day.

The notice of the hearing should include a copy of the appeal court's motion setting terms of reference for the Appeal Committee and naming its members. Providing the information at this stage will help to ensure that questions about bias are raised earlier rather than later in the proceedings.

As with all documents in the appeal process, the notice of the appeal hearing must be given in one of the ways set out in section J.14.4.

We (the Appeal Committee) suspect that one of the parties to the appeal will not participate in the hearing. Is there anything we can do, short of waiting to see if they show up at the hearing?

Organizing and holding an appeal hearing can be expensive and involve a huge time commitment by the members of the Appeal Committee, the parties, and others involved in the process.

The Appeal Committee may request confirmation from the appellant that the appellant intends to carry through with the appeal. The appellant must provide this confirmation within the time required (see Rules of Procedure for Appeals 13.9.2 b) or the Appeal Committee may decide that the appeal has been abandoned. If the appellant provides this confirmation but then fails to appear at the appeal hearing, the Appeal Committee may then decide that the appeal has been abandoned.

Where the Appeal Committee has any reason to doubt that the appellant intends to carry through with the appeal, it is advisable to send this notice. In fact, there is no harm in the Appeal Committee sending this notice in any appeal.

Who may attend an appeal hearing?

An appeal hearing is open unless the appeal involves a formal complaint under the Sexual Abuse Policy or the Appeal Committee decides to close it, in whole or in part.

An appeal involving a formal complaint under the Sexual Abuse Policy is closed.

If a party wishes to have the hearing closed for any other kind of appeal, they should make the request of the Appeal Committee by no later than the start of the appeal hearing. They would also need to support their request with reasons why an open hearing would adversely affect any person.

The Appeal Committee may make that decision if the committee believes that an open hearing would adversely affect any person. Before the committee makes a decision on the request, it should give the other party an opportunity to explain their position on the request. The other party may oppose the request, agree with the request, or not take a position on the request.

If the Appeal Committee has not made a decision that the hearing is closed, anyone may attend the appeal hearing.

Natural Justice and the Duty to Act Fairly

What does “natural justice” mean? How does it apply to appeal hearings?

In an appeal hearing, the Appeal Committee must (i) be unbiased and (ii) give each party a fair opportunity to present their case. These are the general principles of natural justice and are requirements under secular law. If the Appeal Committee conducts the appeal hearing and comes to a decision in a way that honours these general principles, the secular courts will not interfere with the Appeal Committee’s decision.

See page 17 above on the issue of bias for the Appeal Committee.

On the requirement for a fair opportunity to present a case, the secular courts have said that the standard of natural justice depends on the circumstances. As a rule, the greater the adverse consequences to a party in an appeal hearing, the more strictly the Appeal Committee should observe the duty to be fair.

For example, the appeal may involve a decision to place the name of a member of the order of ministry on the Discontinued Service List (Disciplinary). This means the person’s right to continue in paid accountable ministry is at stake, and a high standard of fairness is required throughout the process. The appeal hearing must *substantially* meet the Rules of Procedure for Appeal Hearings and any other procedural rules of the church that are applicable.

As another example, the appeal may involve a decision removing a person from a voluntary position such as a church school teacher, or even expelling them from membership in the United Church. In secular law, the loss of privileges associated with voluntary membership in an organization is considered less severe than the loss of a means of livelihood. That means the standard for natural justice is probably lower in an appeal hearing if the decision under appeal was made about a lay volunteer rather than a member of the order of ministry.

Is it possible to fix minor mistakes in following the Rules of Procedure for Appeals?

The parties can waive procedural rules that exist for their benefit as it may save them time and expense. For example, the Rules of Procedure for Appeals require giving each party 15 days’ advance notice of the appeal hearing. If both parties agree to accept only 13 days’ advance notice, there is no breach of natural justice.

How long should an appeal take, from start to finish?

The Appeal Committee should ensure that the appeal hearing takes place within a reasonable period of time after their appointment. A lengthy delay may prejudice one or both of the parties. If an appeal hearing is pending for many months, the uncertainty of the outcome may affect a party's health or employment prospects. The secular courts may even strike down the eventual decision of an Appeal Committee if they decide that the delay was unreasonably long. Whether or not a delay is "unreasonable" would, again, depend on the facts of the case. As a guideline, an appeal hearing should be concluded within six months of the Appeal Committee's appointment.

At the same time, however, the Appeal Committee should be open to granting adjournments to the parties where necessary to ensure they receive a fair hearing. For example, if one party's legal counsel becomes unavailable on the original date fixed for the hearing, one adjournment should be acceptable. If, however, a party's legal counsel becomes unavailable for a period of several months, the party should be instructed to retain another legal counsel to avoid unreasonable delay. When a formal hearing is adjourned, the Appeal Committee should ensure that the parties are given notice of the new date and time as set out in section J.14.4.

The Appeal Hearing

What is the purpose of an appeal hearing?

The appeal hearing is not a duplication of the first hearing. Rather, it is an opportunity for the appellant to convince the Appeal Committee that the decision being appealed was wrong, for one (or more) of the first four reasons in section J.13.6. Alternatively, the appellant may try to convince the Appeal Committee that there is newly discovered evidence available that might have an important bearing on the case, which is the fifth and last reason for an appeal in section J.13.6.

What happens at an appeal hearing?

The general procedural outline would be the following:

1. The chair of the Appeal Committee
 - declares the appeal hearing open and offers a prayer (the prayer could also be offered by another member of the Appeal Committee);
 - introduces the members of the Appeal Committee, asking the parties to identify themselves and any legal counsel or other representatives or support persons present with them;
 - identifies the person taking the record of the proceedings, and, if the proceedings are being taped, indicates that this is the case;
 - outlines the procedure that will be followed:
 - the appellant has an opportunity to make submissions;
 - the other parties have an opportunity to reply;
 - the appellant has an opportunity to speak again, but only to address any points made in the other parties' replies, not to raise completely new arguments;

- members of the Appeal Committee may ask questions of any party while that party is making submissions; and
- the parties should address all their comments to the Appeal Committee so that there is no dialogue between the parties during the hearing; and
- asks the appellant to begin.

In each case, it may be the legal counsel or other representative for a party instead of the party themselves speaking personally.

2. The appellant explains the reasons why the appeal should be allowed, or a formal hearing ordered, and the reasons must be one or more of the reasons listed in section J.13.6. Generally, the appellant should not be permitted to raise any new grounds which they did not raise in the statement they submitted to the appeal court, because the other parties would not have had an opportunity to respond to those grounds in the respondent's reply or to prepare to respond to them at the appeal hearing.

There may be cases where there are compelling reasons to allow the appellant to raise a new ground at the appeal hearing stage (for example, evidence that might have an important bearing on the case becomes available shortly before the hearing). The appellant may request that the Appeal Committee allow them to raise this new ground, and the Appeal Committee would need to consider carefully the potential prejudice to the other parties in allowing that ground to be raised at this stage. In some cases, the appeal hearing might be adjourned to allow the other parties an opportunity to prepare a reply to the new ground.

The Appeal Committee should consult with its own legal counsel when an appellant makes this this type of request.

3. The Appeal Committee may ask the appellant questions to clarify the points that they are making. This may done throughout the appellant's presentation or at the end of it, as is the committee's preference.
4. The other parties explain why the appeal should be dismissed, by refuting the grounds and reasons raised by the appellant.
5. The Appeal Committee may ask the other parties questions to clarify the points that they are making. This may be done throughout their presentation.
6. The appellant has a second opportunity to speak to respond to any points raised in the other parties' reply, but not to introduce any new arguments.
7. The chair thanks all parties for participating. A closing prayer would also be appropriate.
8. The Appeal Committee may feel that it is in a position to make a decision immediately, or may choose to take time to come to a decision. In either case, the committee must give written reasons for its decision to the parties when the reasons have been finalized.

If the appeal hearing gets “out of hand” at any point, or if procedural questions are raised, the chair may wish to call a short recess to permit the Appeal Committee to withdraw to another room and to consult with the Conference executive secretary or the committee’s own legal counsel if necessary.

Is evidence allowed at an appeal hearing?

In most cases, evidence would not be given by either party at an appeal hearing.

Occasionally, an Appeal Committee may decide there are circumstances that make it necessary or desirable to hear testimony from witnesses. For example, the committee may need to have minor factual issues clarified. If there is evidence given by witnesses, there also needs to be an opportunity for cross-examination and reply questioning, as in a formal hearing.

The Appeal Committee must follow the applicable rules of evidence for the province or territory in which the appeal is held. If either party wishes to present evidence in an appeal hearing, it is advisable for the committee to consult with its own legal counsel. This is particularly important if there is any disagreement between the appellant and another party as to whether a particular piece of evidence should be admitted by the committee, or the committee itself has any concerns about what is appropriate.

Failure to comply with the rules of evidence will make the Appeal Committee’s decision vulnerable to being overturned on appeal or by the secular courts.

If the Appeal Committee feels that there are many important factual issues to be clarified, it would be advisable to order a formal hearing. See the next section below.

What options does the Appeal Committee have for its decision?

The Appeal Committee has three options in making its decision, as follows:

(i) to allow the appeal

The Appeal Committee may decide that one or more of the grounds for an appeal in section J.13.6 has been met. By allowing the appeal, the Appeal Committee reverses the decision under appeal, so that the situation is restored as it existed immediately before that decision was made.

The court that made the decision will then be in a position to make a new decision on the same matter. That decision may be the same as the original one that was reversed on appeal, or it may be different. In either case, any procedural or other errors that the Appeal Committee found in the original decision need to be corrected in making the new decision.

(ii) to dismiss the appeal

The Appeal Committee may decide that the appellant has not convinced them that the court made the wrong decision. By dismissing the appeal, the Appeal Committee upholds the decision of the court that made it.

(iii) to order a formal hearing

The Appeal Committee may order that a formal hearing of the matter be held by either the lower court or the appeal court. Here are two examples of when an Appeal Committee might decide to order a formal hearing:

- If there had been an opportunity for witnesses to testify before the decision was made by the lower court but the appellant convinces the Appeal Committee that there is newly discovered evidence that might have an important bearing on the case.
- If there had been no opportunity for witnesses to testify before the decision was made by the lower court, and the appellant convinces the Appeal Committee that there are valid questions about important factual matters that cannot be resolved without testimony from witnesses.



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